No. 21071

In the United States Court of Appeals for the Ninth Circuit

ROY W. DEWELLES, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

On Appeal from the Judgment of the United States District Court for the Southern District of California

BRIEF FOR THE APPELLEES

MITCHELL ROGOVIN,
Assistant Attorney General.

LEE A. JACKSON,
JOSEPH KOVNER,
MARK S. ROTHMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

Of Counsel:

EDWIN L. MILLER, JR.,
United States Attorney.

CHARLES H. MAGNUSON,
Assistant United States Attorney.

INDEX

CITATIONS

In the United States Court of Appeals for the Ninth Circuit

No. 21071

ROY W. DEWELLES, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

On Appeal from the Judgment of the United States District Court for the Southern District of California

---

BRIEF FOR THE APPELLEES

OPINION BELOW

The District Court's findings of fact and conclusions of law (R. 193-196)[1] are not officially reported.

JURISDICTION

The instant action was brought to enjoin the collection of an assessment of income taxes for 1957 in the sum of $25,353.91 and an assessment of income

[1] "R." references are to pages of the record on appeal.

taxes for 1958 in the sum of $103,654.52 pursuant to 28 U.S.C., Section 1340, and 26 U.S.C., Sections 6213 and 7421(a). The District Court entered judgment dismissing the complaint on February 7, 1966. (R. 197.) On April 6, 1966, within 60 days, taxpayer filed a notice of appeal. (R. 198.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the District Court correctly held that the notice of deficiency was properly sent to taxpayer's last known address as required by Section 6212 of the Internal Revenue Code of 1954.

STATUTES AND RULES INVOLVED

Internal Revenue Code of 1954:

> SEC. 6212. [as amended by Secs. 76 and 89(b) of the Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606] NOTICE OF DEFICIENCY.
>
> (a) *In General.*—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.
>
> (b) *Address for Notice of Deficiency.*—
>
> (1) *Income and gift taxes.*—In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A or chapter 12, if maled to the taxpayer at his last known address, shall be sufficient for

purposes of subtitle A, chapter 12, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

* * * *

(26 U.S.C. 1964 ed., Sec. 6212.)

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) *Time for Filing Petition and Restriction on Assessment.*—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421 (a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * *

(26 U.S.C. 1964 ed., Sec. 6213.)

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT ON COLLECTION.

(a) *Tax.*—Except as provided in sections 6212 (a) and (c), and 6213 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * *

(26 U.S.C. 1964 ed., Sec. 7421.)

Federal Rules of Civil Procedure:

Rule 52.

FINDINGS BY THE COURT

* * * *

(b) *Amendment.* Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Rule 60.

RELIEF FROM JUDGMENT OR ORDER

* * * *

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.*

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * *
>
> * * * *

STATEMENT

The pertinent facts, as found by the District Court are as follows:

For several years prior to 1962 and until August 18, 1962, taxpayer lived at 2177 Live Oak Drive, Los Angeles, California. This address was taxpayer's regular permanent address and his place of residence. (R. 193.) Although taxpayer had used other addresses for his filed income tax return for the years 1957, 1958 and in an amended return for 1959, taxpayer had established his address as 2177 Live Oak Drive for the purpose of dealing and corresponding with the Internal Revenue Service. (R. 193-194.) The Live Oak address was first so established at a meeting between taxpayer and an Internal Revenue Service Agent in April of 1962 and its establishment was further evidenced by the transmittal thereafter of all official correspondence by the Internal Revenue Service to taxpayer at such address. Up to August 18, 1962, all such correspondence was received by taxpayer. (R. 194.)

On August 18, 1962, taxpayer moved to the State of Mississippi, residing temporarily in a trailer camp in Mississippi City until he moved into a house in Pass Christian. However, he did not notify the In-

ternal Revenue Service either orally or in writing of this change of address prior to and including August 29, 1962. (R. 194.)

Pursuant to an investigation into taxpayer's income tax matters, the Internal Revenue Service sent taxpayer a notice of deficiency (90-day letter) on August 29, 1962, addressed to him at 2177 Live Oak Drive, Los Angeles, California, the address to which previous correspondence had been sent, since the Internal Revenue Service had received no notification from taxpayer that he had a new address. (R. 194.) Taxpayer actually received this notice of deficiency no later than November 22 or 23, 1962, and it was the belief of the District Court that taxpayer received the notice much before November 22, 1962. (R. 195.) The time for filing a petition with the Tax Court expired on November 27, 1962, and on that date taxpayer had not filed any petition with that court. (R. 195.) Therefore the Government proceeded to collect the taxes due according to the notice of deficiency sent to taxpayer. ~~(R. .)~~ However, taxpayer brought this suit to enjoin the United States from collecting the amounts assessed under the notice of deficiency sent on August 29, 1962, on the ground that the notice of deficiency was not proper since not sent to taxpayer at his last known address. Taxpayer contended that he used a different address on his tax returns and also that he had moved from the Live Oak address by the time the notice of deficiency was sent. (R. 2.) The District Court found that the Live Oak address was the one furnished by the tax-

payer to an Internal Revenue Service Agent, that taxpayer had received official correspondence at that address in June, 1962, and that taxpayer had not notified the Internal Revenue Service of any change of address prior to the date the notice of deficiency was sent. The District Court then found that 2177 Live Oak Drive, Los Angeles, California, was taxpayer's last known address on August 29, 1962, and therefore the notice of deficiency was properly sent to taxpayer at his last known address. (R. 193-196.) The District Court, therefore, granted the Government's motion to dismiss taxpayer's complaint. (R. 196, 197.)

SUMMARY OF ARGUMENT

Taxpayer sued to enjoin the United States from collecting income taxes which had been assessed, claiming that the notice of deficiency was not sent to him at his last known address, as required by Section 6212(b) of the Internal Revenue Code and, therefore, no assessment or collection of the taxes could be made. However, the District Court dismissed taxpayer's complaint after holding that the notice of deficiency was properly sent.

Section 6212(b) of the Internal Revenue Code provides that the notice of deficiency must be sent to taxpayer at his last known address, and this Court has held that where the Commissioner learns or is advised by the taxpayer that taxpayer has changed his address, the Commissioner must use the new address.

In this case, taxpayer filed returns using an address in Encino, California. Subsequently a Revenue Agent began investigating some of taxpayer's returns, and during a conference taxpayer told the Agent he lived at 2177 Live Oak Drive, Los Angeles, California. Thereafter the Commissioner sent taxpayer official correspondence at the Live Oak address, which taxpayer admittedly received. A few weeks after taxpayer moved from the Live Oak address to Mississippi without notifying the Commissioner, the Commissioner sent taxpayer a notice of deficiency addressed to the Live Oak address. Taxpayer did not petition the Tax Court within 90 days of the date the notice of deficiency was sent, so the Commissioner proceeded to collect the tax.

It is clear that under the above facts the Commissioner sent the notice of deficiency to taxpayer at his last known address as required by Section 6212 of the Internal Revenue Code. Therefore, taxpayer was prohibited by Section 7421(a) of the Internal Reveneu Code from bringing any suit to enjoin the collection of the tax and the District Court correctly dismissed taxpayer's complaint.

ARGUMENT

The District Court Correctly Held That the Notice of Deficiency Was Properly Sent to Taxpayer's Last Known Address as Required by Section 6212 of the Internal Revenue Code of 1954

Section 7421(a) of the Internal Revenue Code of 1954, *supra*, specifically provides that no suit may be brought to enjoin the collection of any tax in any

court; except as provided in Section 6212(a) and (c) and 6213(a). These latter sections deal with the sending by the Commissioner of a notice of deficiency, commonly known as a 90-day letter. Section 6212 (a), *supra*, authorizes the Commissioner to send the taxpayer a 90-day letter by certified or registered mail when it is determined that there is a deficiency in tax. Section 6212(b), *supra*, states that the sending of the 90-day letter to the taxpayer "at his last known address, shall be sufficient for purposes of * * * this chapter * * *." Section 6213(a), *supra*, allows the taxpayer a period of 90 days from the day the notice of deficiency is mailed to petition the Tax Court for a determination on the deficiency and prohibits the Commissioner from assessing or collecting the tax involved either prior to the sending of the notice of deficiency, or during the 90-day period in which taxpayer may petition the Tax Court.[2]

However, if the notice of deficiency is properly sent and the taxpayer does not petition the Tax Court within the 90-day period, the Commissioner may proceed to collect the tax, and no suit to enjoin such collection may be brought.

In the instant case, the Commissioner determined that there was a deficiency in taxpayer's income for the years 1957 and 1958. Since the time for assessment of this deficiency was running out, and taxpayer would not agree to an extension of the time, the

---

[2] There is one exception to this rule which allows the Commissioner to make a jeopardy assessment under Section 6861, but that is not involved in the instant case.

Commissioner sent taxpayer a notice of deficiency on August 29, 1962, for the years 1957 and 1958. This notice was addressed to taxpayer at 2177 Live Oak Drive, Los Angeles, California. (Ex. 5.) Although taxpayer had used an address in Encino, California, on his most recently filed returns, the taxpayer had, in a conference with Internal Revenue Service Agent Kosman in April, 1962, informed Kosman that his address was 2177 Live Oak Drive, Los Angeles. (R. 194; Tr. 91.)[3] Thereafter on June 28, 1962, Agent Kosman sent a certified letter to taxpayer at the Live Oak address requesting taxpayer to sign and return Form 872, a consent to the extension of the statute of limitations. Taxpayer's wife signed the receipt for the letter, such receipt showing the address of 2177 Live Oak Drive (Ex. A), and taxpayer admits that he received the letter (Tr. 50). There is no evidence that taxpayer objected at that time to receiving official correspondence from the Internal Revenue Service at the Live Oak address, which he himself had previously furnished to the Internal Revenue Service Agent. A second request to submit Form 872 was sent by the Internal Revenue Service to taxpayer on August 13, 1962, also addressed to the Live Oak address (Ex. B), although this letter was not sent by certified mail. Furthermore, on August 28, 1962, the Commissioner sent the Revenue Agent's report to taxpayer at the Live Oak address (Ex. E) and taxpayer has stipulated that he received it (Tr.

---

[3] "Tr." references are to pages of the transcript of testimony.

47-48). Since taxpayer did not execute the consents to extend the statute of limitation, the Commissioner sent taxpayer a notice of deficiency on August 29, 1962. This notice was also sent to the Live Oak address because that is the address at which the Commissioner had been communicating with the taxpayer up to that time, and the Commissioner had not received any notification that any other address should be used. Therefore, the District Court correctly dismissed the taxpayer's complaint since, under Section 7421(a) of the Code, no suit to enjoin the collection of the tax involved here could be brought once it was shown that the Commissioner properly sent a notice of deficiency to taxpayer at his last known address and taxpayer did not petition the Tax Court within the 90-day period.

Taxpayer's main contention in this case is that the Commissioner was required to send the notice of deficiency to the Encino address used by taxpayer on the last return which he filed, either instead of or in addition to sending the notice to the Live Oak address. Since the Commissioner did not do so, argues the taxpayer, the notice of deficiency was invalid and this suit may be maintained to enjoin collection of the tax. There is absolutely no merit to this argument.[4]

---

[4] It is interesting to note that after taxpayer lost in the District Court he asked that court's permission to prosecute this appeal in forma pauperis. That court denied the request on the ground that the appeal was frivolous. Taxpayer then moved in this Court to appeal in forma pauperis and the United States opposed the motion, citing the District Court

The language of Section 6212(b) is clear that the Commissioner merely has to send the notice of deficiency to taxpayer at his "last known address". There is no further definition of that term in the Code or Regulations which is applicable here, and indeed, none would appear necessary. Last known address would appear to mean exactly what it says, and not, as taxpayer urges, the address used on the last filed tax return when a new address has subsequently been furnished by taxpayer and used by the Commissioner or, in other words, former known address. This Court in *Cohen* v. *United States*, 297 F. 2d 760, made it clear that the address given by the taxpayer on his return is subject to change, saying (p. 773):

> The Commissioner or one of his agents may learn that the taxpayer has changed his address, or he may be so advised by the taxpayer. In such a case, he must use the new address.

See also *Luhring* v. *Glotzbach*, 304 F. 2d 556 (C.A. 4th).

The last tax return filed by taxpayer prior to August 29, 1962, was an amended 1959 return which he filed in August, 1960. However, in April, 1962, he informed Revenue Agent Kosman, during a personal interview, that he lived at 2177 Live Oak Drive, Los Angeles, and taxpayer subsequently received, by his own admission, official correspondence from the Internal Revenue Service at that address. In light of these

---

holding of frivolity. This Court denied taxpayer's motion on April 11, 1966.

facts and the applicable law, it is indeed specious of taxpayer to argue that the last known address was the Encino address used on the tax returns.

Taxpayer also testified that he orally notified Revenue Agent Kosman on August 17, 1962, that he was moving to Mississippi the following day (Tr. 15-16) and, therefore, contends that the Mississippi address was his last known address. The simple answer to this is that the District Court specifically refused to believe taxpayer's testimony in this regard, and found as a matter of fact that taxpayer never notified the Internal Revenue Service in writing or orally of any change of address from April, 1962, to and including August 29, 1962. (R. 194.) This finding of fact is supported by the testimony of Revenue Agent Kosman who testified that taxpayer did not tell him he was moving to Mississippi during their meeting on August 17, 1962, and that prior to August 29, 1962, he was not aware of any change of taxpayer's address from 2177 Live Oak Drive. (Tr. 97-98.) It is well established that the resolution of conflicting evidence is within the discretion of the trial judge who has observed the demeanor of the witnesses, and may not be overruled unless shown to be clearly erroneous. Rule 52(a), Federal Rules of Civil Procedure. Certainly taxpayer has made no such showing in this case.

The fact that taxpayer actually received the notice of deficiency prior to the expiration of the 90-day period is, as taxpayer himself states, "irrelevant and immaterial". (Br. 30.) The Internal Revenue Code

provides merely that notice must be properly sent, and not that it must have been received by the taxpayer. *Brown* v. *Lethert*, 360 F. 2d 560 (C.A. 8th). Since the court found that the notice was sent to taxpayer's last known address there is no need to consider whether or not taxpayer ever received it. Only if the court should find that the 90-day letter was not sent to taxpayer at his last known address does it have to consider taxpayer's actual receipt and its effect. Taxpayer admitted he received the 90-day letter on November 22, 1962, or November 23, 1962. (Tr. 19-20), and, therefore, contends that he only had four or five days in which to petition the Tax Court. However, the District Court believed that taxpayer actually received the 90-day letter ~~must~~ much before November 24 and, therefore, had ample time to petition the Tax Court. (R. 195.) The evidence showed that taxpayer made thorough provisions for the forwarding of his mail. He left instructions with the Post Office to forward mail from 2177 Live Oak Drive to his post office box in Encino, California. He then had mail either forwarded from Encino to him in Mississippi or picked up by his attorney who sent it to him. (Tr. 22-23.) The evidence, therefore, amply supports the District Court's belief that taxpayer received the 90-day letter in time to petition the Tax Court. In fact, even the four or five days which taxpayer admits he had would seem to be sufficient in this case since he already had counsel advising him on this matter who, even if busy, could have filed a petition sufficient to invoke the jurisdiction of the

Tax Court which could have been amended later if necessary.[5]

Taxpayer introduces new evidence on this appeal which he then discusses in his brief. This new evidence, consisting of affidavits of Revenue Agent Kosman, Zella DeWelles, and the original of the Form 872 sent to taxpayer were not introduced at the trial, are not part of the record in this case, and, therefore, are not before the Court. If taxpayer wished to introduce new evidence after the trial, this Court has said that the proper procedure is a motion under Rule 60(b)(1), *supra*, of the Federal Rules of Civil Procedure in the District Court. If such motion is granted, then taxpayer may move this Court to remand, whereas if the motion is denied taxpayer may appeal such order and consolidate it with the appeal now pending. *Greear* v. *Greear*, 288 F.2d 466 (C.A. 9th). It might be noted, however, that this new evidence does not add anything to taxpayer's case since Revenue Agent Kosman's affidavit shows that he merely followed a procedure of using as the address on the Form 872 the address used by taxpayer on the return. There is no dispute that taxpayer used the Encino address on his returns for the years involved, but, as we have previously shown, this was not the last known address.

---

[5] The record shows that taxpayer stated he would have to consult his attorney when the Revenue Agent asked him in June, 1962, to sign the consent form (Tr. 14-15). It is, therefore, obvious that he already had counsel who was familiar with taxpayer's tax problems.

Taxpayer's discussion of *Flora* v. *United States*, is not directly relevant to this case. While it is true that taxpayer here will not be able to litigate his tax liability for the years 1957 and 1958 in the Tax Court, a recent Eighth Circuit case, following the established rule, holds that even where taxpayer did not receive the 90-day letter and this was known by the Commissioner, no suit to enjoin the collection of the tax could be brought if the 90-day letter were properly sent to taxpayer. *Brown* v. *Lethert*, *supra*. Taxpayer has no constitutional right to litigate in the Tax Court. Congress provided in the Internal Revenue Code a reasonable system whereby taxpayers could petition the Tax Court. The fact that taxpayer may not now petition the Tax Court in this case does not deny him his constitutional right to litigate his tax liability. He may pay the tax and sue for a refund, at which time the merits of his claims will be adjudicated. Furthermore, it is apparent that taxpayer here could have litigated in the Tax Court had he so desired, as evidenced by the above discussion.

Finally, there is no merit to taxpayer's request that the Commissioner should have sent two notices of deficiency to taxpayer, one to the Live Oak address and the other to the Encino address. This argument may have some validity where a taxpayer maintains two addresses and has dealings with the Commissioner at both. But that is not the case here. There was no doubt in the Commissioner's mind that the Live Oak address was the only proper address. Taxpayer had furnished this address to the Agent, the Commissioner had sent official correspondence to that address

which taxpayer received, and the Commissioner had no notification that taxpayer was no longer at that address. In this case, the District Court was correct in finding that the notice of deficiency was properly sent to taxpayer at his last known address and, therefore, the taxpayer's complaint must be dismissed.

CONCLUSION

For the foregoing reasons the decision of the District Court is correct and its judgment should be affirmed.

Respectfully submitted,

MITCHELL ROGOVIN,
Assistant Attorney General.

LEE A. JACKSON,
JOSEPH KOVNER,
MARK S. ROTHMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

Of Counsel:

EDWIN L. MILLER, JR.,
United States Attorney.

CHARLES H. MAGNUSON,
Assistant United States Attorney.

DECEMBER, 1966.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: ..... day of December, 1966.

MARK S. ROTHMAN
Attorney

☆ U. S. GOVERNMENT PRINTING OFFICE; 1966 240152 440